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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE ANGEL BARAJAS, JR., Defendant and Appellant.	B226353 (Los Angeles County Super. Ct. No. GA077751)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura F. Priver, Judge. Reversed with directions.

Trisha Newman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Chung L. Mar and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

The Case and the Facts

Defendant and appellant Jose Barajas, Jr. ("Jose") was convicted of threatening his wife with violence immediately after he was released from custody for earlier domestic violence. His appeal challenges the determination that his prior conviction qualified as a serious felony under the three strikes law, the trial court's failure to instruct the jury that it must agree unanimously on which specific statements constitute the threat underlying each of its verdicts, and the absence of a jury instruction on the lesser included offense of attempted criminal threat. Certain of his contentions will require reversal of the judgment and remand for resentencing or retrial.

1. The Facts[1]

Jose and Yvonne Barajas had been married for nine years, and they had an eight-year-old son. On August 27, 2009 Yvonne picked Jose up upon his release from the Glen Oak Fire Camp, following his incarceration in mid-2007 for violence against her in December 2006. She expected him to stay with her and their son for a day or so until he was settled with his parole officer. They planned "to give our marriage . . . another try."

During that afternoon Jose and Yvonne purchased food and other items, they picked their son up after school, and Jose got a haircut. After Jose borrowed Yvonne's cell phone to talk to other family members, Yvonne purchased him a prepaid cell phone. They then went to a park, intending to meet with other relatives. She told Jose when she had picked him up, and again later, that he if drank, used drugs, or hit her again "that was going to be it," she "couldn't stay in the marriage anymore." She did not want him to drink because in the past when he drank he became violent.

While at the park, and before Jose had returned Yvonne's phone to her, Yvonne's phone rang. Jose tried to answer it as an incoming call, but Yvonne identified the distinctive ringtone for a text message and took back the phone—but not before Jose had seen that the sender had a man's name. Under Jose's questioning Yvonne told him that

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[1] We recite the facts presented at trial in the light most favorable to the judgment, unless otherwise appropriate to consider issues of law.

the sender was the friend of her cousin, and that she did not know why she would be on his group-message list. Jose kept pressing her, becoming increasingly angry and accusing her of lying to him. As they walked back to Yvonne's car, Jose yelled at her—repeatedly—to "shut the fuck up or he was going to break my jaw if I wasn't going to tell him the truth." Jose continued yelling at her as they got into the car and drove, and he threw her phone, hitting her shin.

Yvonne was crying and was scared of being hit by Jose, or of having him drive erratically. Although she let the incident pass, she again became upset when at their destination their seven-year-old son got out of the car, threw a water bottle at the car, and told Jose not to yell at Yvonne anymore.

Jose had wanted to buy beer at a 7-Eleven at which they had stopped before going to the park, and again after arriving at Yvonne's home he said he wanted a beer. Yvonne initially told him "no way." But she eventually told him "fine," have some beer, but he should "just leave," and she would leave too—which they both did.

Both Yvonne and Jose returned to the house soon afterward, however, when Jose told Yvonne on the phone that he was unable to buy beer because he lacked identification. After exchanging apologies, Yvonne reentered the home and put the child back to bed. She then went to bed, and Jose stayed up to listen to music. Sometime during the night Jose joined Yvonne in bed, at least partially at her invitation. During their ensuing conversation, Jose told her that he did not care that he was breaking her rules and drinking alcohol despite his inability to handle it, because he didn't care if he went back to jail. He said "that he liked it in jail and he liked the fights and just the chaos." Later, they had sex, and Yvonne slept.

When Yvonne awoke, Jose was gone. When she reached him on the phone, he explained that he was going to the parole office, that "he couldn't do this anymore," and that he was sorry. (Yvonne was uncertain whether he was referring to his inability to continue with their marriage, his inability to live outside of jail, or some other thing.) He left Yvonne $300 on the dresser for car insurance and their son's school clothes. During

the ensuing exchange of many phone calls, Jose admitted he had been drinking, and Yvonne threatened to call his parole officer.

Sometime in the mid-morning, Yvonne missed a number of Jose's phone calls while she took a shower. That resulted in Jose asking angrily why she had not answered the phone, and "who the fuck was at my house." Jose told Yvonne that he was coming back to pick up his clothes, and he "threatened to kick [her] ass." Being alone and fearing violence, Yvonne left the house. At another point, however, she testified that when he said he was going to kick her ass, "I wasn't scared. . . . I didn't feel fear. Or maybe I did. I'm not sure but I knew if I got anywhere near him during this time that he was going to kick my ass."

Yvonne went to the local police department to find out whether she could have Jose pick up his clothes there instead of at her house; during this process Jose continued to call her on the phone (from five to eight times). On her way home to meet the police there for an exchange of Jose's clothes she received another call from Jose, asking "where the fuck [she] was at" and demanding that she meet him at a nearby bakery or he would "kick [her] ass." Jose also threatened to kick the ass of a mutual friend from whom Yvonne had borrowed $20 in order to pick Jose up the previous day. Yvonne was scared; she returned to the police station and spoke with a number of officers.

By the time Yvonne returned to her home a number of patrol cars and officers were there. Yvonne was not permitted to enter her house; she went to a neighbor's house while the police entered, apparently through the rear door. During all this time, Yvonne continued to receive multiple telephone calls from Jose, asking her to meet him at various locations and seeking return of the money he had left her. She did not answer many of his calls, and hung up on others. In one of the calls Jose asked her how she could have called the police to her home—indicating to her that he was nearby, which scared her.

When Yvonne eventually was able to enter her home, she found the back door slightly open and damaged near the doorknob. When she entered (after her cousin's boyfriend had walked through the house) she found that Jose's things were still there, and almost everything seemed undisturbed.

Jose was arrested later that day in front of the Temple City Sheriff's station. During a phone conversation soon after his arrest, Yvonne told Jose that she knew he had kicked in the back door to enter her house while she was gone, because nothing was missing. He denied damaging the door, but when she yelled at him for breaking her favorite sunglasses, he responded, "Oh, you saw that," or something to that effect.

Within the next two weeks Yvonne moved to another home, out of fear Jose would be released and would return to her home. She did not give Jose her new address.

Jose called Yvonne "thousands of times" during the approximately nine months between his arrest and his trial—typically about 10 times a day, but once over 150 times in one day. She had answered only some of his calls.[2]

During some of the calls she had answered, Jose had asked for her new address, and had asked that she not appear in court to testify against him. Yvonne had refused to give him her address, because "at times" she is still afraid of him, and because she had agreed not to do so when she sought help from the witness relocation services through the District Attorney's office. Yvonne also testified that on six or seven previous occasions Jose had threatened violence and had struck her and their child, resulting in earlier restraining orders and arrests.

2. The Case

Jose was charged in counts 1 and 2 of an information with making criminal threats against Yvonne (Pen. Code, § 422), and in count three with vandalism (Pen. Code, § 594, subd (a)).[3] The information also alleged as to counts 1 and 2 that during the five-year period before his offenses Jose had been imprisoned for prior felony convictions, within the meaning of the "three strikes" law. (§§ 667.5, subds. (b)-(i); 1170.12, subds. (a)-(d).)

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[2] Over the defendant's objections, primarily under Evidence Code section 352, the jury received evidence that Jose had attempted 6,188 calls to Yvonne's phone since his arrest, many of which she received; and the jury heard recorded portions of about 10 of those conversations in which Jose apparently had admitted certain conduct on the days leading to his arrest, and had asked Yvonne not to appear to testify at his trial.

[3] All statutory references are to the Penal Code unless otherwise specified.

The alleged prior convictions were for battery with serious bodily injury (§ 243, subd. (d), petty theft with a prior theft conviction (§ 666), and burglary (§459). Jose pleaded not guilty and denied the alleged prior convictions.[4]

After a three-day trial and one hour of deliberation, a jury convicted Jose of criminal threats as alleged in counts 1and 2, and acquitted him of the vandalism charged in count 3. Jose waived jury trial as to the prior conviction allegations.

The trial court ruled (over Jose's contrary argument) that the prior conviction under section 243, subdivision (d)—battery with serious bodily injury—was a serious felony constituting a strike under section 667, subdivisions (b) through (i) and section 1170.12, subdivisions (a) through (d). The court denied Jose's request for dismissal of the strike (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497), and found the allegations under sections 667 and 667.5 to be true.

The trial court sentenced Jose to the two-year middle term on count 1, doubled to four years for the strike; on count 2 it sentenced him to a consecutive eight-month term, doubled to 16 months for the strike; and for the enhancement under section 667, subdivision (a), it sentenced him to five years, consecutive to the sentences for counts 1 and 2. The total resulting sentence was for a state prison term of 10 years and four months (adjusted for credits, plus applicable fines and fees). Jose filed a timely notice of appeal.

Discussion

Jose does not challenge the sufficiency of the evidence to support the verdicts.[5] On appeal he argues that (1) the evidence was insufficient to support the determination

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[4] Before trial, Jose moved to suppress evidence (§ 1538.5), and filed two successive *Pitchess* motions seeking discovery (from two separate police departments) of records regarding false testimony and police reports. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) Both *Pitchess* motions were granted, but the resulting *in camera* examinations each yielded no discoverable information. The suppression motion was taken off calendar.

[5] Because Jose did not testify, the evidence contained no denial that he had made the count 1 and count 2 threats; and some of his recorded telephone conversations apparently

that his prior conviction was for a serious felony, under the three strikes law; (2) the trial court erred by refusing his request for a unanimity instruction to the jury; and (3) as to the criminal threat counts, the trial court erred by failing to instruct the jury, sua sponte, on the lesser included offense of *attempted* criminal threat. We conclude that certain of these contentions require reversal of the judgment, and remand to the trial court for resentencing or retrial.

I. The Evidence Presented To The Trial Court Is Insufficient To Support The Finding That Jose's Prior Conviction Constituted A Serious Felony Under The Three Strikes Law.

Under the three strikes law set forth in sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), a prior conviction of a serious or violent felony requires the imposition of specified sentencing enhancements. In this case, the trial court found that Jose had suffered a prior conviction under section 243, subdivision (d), and that the conviction was a serious felony constituting a strike under section 667, subdivisions (b) through (i) and section 1170.12, subdivisions (a) through (d). On that basis it found the allegations under sections 667 and 667.5 to be true, and imposed the enhancements required by the three strikes law.[6]

The three strikes law defines a "serious felony" constituting a strike as either an offense defined as a violent felony in section 667.5, subdivision (c), or "any offense defined in subdivision (c) of section 1192.7 as a serious felony in this state." (§§ 667,

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contained either explicit or implicit admissions that he made the statements attributed to him.

Jose's counsel did not argue to the jury that Jose had not threatened Yvonne as she testified. Instead she argued that Yvonne had not felt genuine fear resulting from his statements, and that some of his statements should not be seen as admissions of criminal conduct. Yvonne's testimony, and the recorded telephone conversations, both provide substantial detail that supports each of the elements of the crimes charged. Because Jose's appeal does not challenge the sufficiency of the evidence to support the verdicts it is unnecessary for us to recount that detail here.

[6] Jose stipulated that he had suffered the prior conviction, but not that it constituted a strike.

subd. (d), 1170.12, subd. (b); see *People v. Reed* (1995) 33 Cal.App.4th 1608, 1611-1612 [language of §§ 667, subd. (d) and 1170.12 subd. (b)(1) are essentially the same].) Section 667.5, subdivision (c), defines 23 categories of felonies that constitute "violent" felonies, but it does not identify a conviction under section 243, subdivision (d), as coming within that definition. Thus the three strikes law applies to Jose's conviction only if a conviction under section 243, subdivision (d), is defined in section 1192.7 as a "serious felony." The trial court ruled that it is.

Section 1192.7, subdivision (c), defines a "serious felony," to the extent relevant here, as ". . . (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice . . . ." Although the record in this case includes Yvonne's testimony that the prior conviction under section 243 involved Jose's infliction of harm on her—a non-accomplice—Respondent concedes that her testimony is not competent to establish the truth of the prior conviction allegation. (*People v. Trujillo* (2006) 40 Cal.4th 165, 177 [approving the court's earlier ruling that in determining whether a prior conviction is for a "serious felony," the trial court may look only to the record of the conviction].)

The upshot of these rules is that in order to classify that crime as a serious felony under section 1192.7, subdivision (c)(8), and thereby to determine that Jose's prior conviction under section 243 constituted a strike, the court had to determine that appellant could have been convicted of that offense only if he *personally* inflicted great bodily harm on someone *other than an accomplice*. And for that determination, the court could look only to the facts on which the prior conviction was based. It could not look to Yvonne's subsequent testimony about the facts underlying that offense in order to find that the conviction actually rested on evidence beyond what was required for the conviction—in this case, evidence that the injury had been personally inflicted by Jose, and its victim had been a non-accomplice.

The trial court received records establishing Jose's prior conviction. But those records were sufficient only to establish the conviction for battery with great bodily injury (§ 243, subd. (d)); they contained nothing to show that Jose had *personally*

inflicted bodily injury on a *non-accomplice* victim, as would be required to establish that the offense constituted a "serious" felony under section 1192.7, subdivision (c)(8). The evidence admitted on that issue therefore could not support the trial court's "serious felony" finding. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 261 [conviction for assault with a deadly weapon cannot be classified as "serious felony" without evidence that great bodily injury was personally inflicted by the defendant].)

Respondent concedes that for these reasons the record contains no support for the finding that Jose's prior conviction for battery with serious bodily injury constituted a strike, and that finding must be reversed. The matter will be remanded for retrial on the prior conviction allegation. (*People v. Barragan* (2004) 32 Cal.4th 236, 241 [strike allegation may be retried after reversal of finding for insufficient evidence].)

II. The Trial Court Did Not Err In Not Instructing The Jury On Its Duty To Agree Unanimously On The Specific Acts Constituting The Offense.

In order to convict a defendant, the jury must agree unanimously that the defendant is guilty of specific acts constituting the charged crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Thus when a defendant is charged with one criminal act, but "the prosecution shows several acts, each of which could constitute a separate offense," the trial court either must instruct the jury on this unanimity requirement, or the prosecution must elect which of the possible criminal acts shown by the evidence constitute the basis for the charges, and it must inform the jury of that election. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534; *People v. Russo*, *supra*, 25 Cal.4th at p. 1132; *People v. Jones* (1990) 51 Cal.3d 294, 321.) The purpose behind this rule is to prevent the jury from "amalgamating evidence of multiple offenses" in order to convict the defendant without a unanimous jury determination of his or her guilt of any one of the multiple alleged criminal acts. (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472.

The risk that the jury might fail to unanimously agree on the criminal acts on which the conviction rests is not universally present in every instance in which there is evidence showing multiple criminal acts, however. Where it is clear from the record—including the prosecutor's argument—that there is no substantial likelihood of juror

disagreement about which particular acts support the verdicts, no unanimity instruction is required. (*People v. Jones*, *supra*, 51 Cal.3d at pp. 321-322.)

Jose requested that the trial court instruct the jury on its obligation to unanimously agree on the specific acts that form the basis for its verdicts in this case. The trial court held that its decision with respect to the unanimity instruction would rest on how the prosecution planned to argue the case: If the prosecutor would "select in your argument which acts you believe form the basis for the counts," no unanimity instruction would be necessary. But "[i]f you change your mind and wish to argue there are multiple acts, any one of which could form the basis, then I would agree the defense is entitled to the instruction as it relates to the jury being unanimous as to which act." After obtaining the prosecution's assurance that its argument would identify to the jury the specific acts on which it relied to establish each of the charged threats, the trial court refused the request for a unanimity instruction.[7]

On the general principles concerning the circumstances under which a defendant is entitled to a unanimity instruction of the sort requested by Jose, the parties agree. They disagree, however, on whether the specific acts that were being relied upon to support the criminal threat charges against Jose in this case were in fact clearly identified for the jury.

Consistent with the trial court's ruling, we conclude that if the record shows that the prosecutor clearly communicated to the jury the specific discrete acts relied upon to support the criminal threat charges, and that there is no reasonable possibility that the jury might disagree as to the particular acts for which Jose was convicted, the trial court's refusal to instruct the jury on its unanimity obligation was not error. (*People v. Jones*, *supra*, 51 Cal.3d at pp. 321-322.) But the converse is also true: If the prosecutor "did not directly inform the jurors of his election and of their concomitant duties, it was error for

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[7] Although the trial court did not instruct the jury that it must unanimously agree on the specific acts that form the basis for its verdicts on each count, it did give the standard instruction that "[y]our verdict on each count must be unanimous. This means that to return a verdict, all of you must agree to it."

the judge to refuse a unanimity instruction in the first instance and to disregard his sua sponte duty thereafter." (*People v. Melhado*, *supra*, 60 Cal.App.4th at p. 1536.)

Jose argues on appeal that the evidence of multiple threats created the possibility that jurors might disagree about the particular acts constituting the criminal threats with which he was charged. He argues that the specific acts constituting the charged threats were not clearly identified for the jury, and that the jurors were not told of their duty to reach unanimous agreement with respect to those acts. He argues that his count 1 and count 2 convictions for the criminal threats therefore must be reversed, because the error in failing to instruct the jury on its unanimity obligation was not harmless beyond a reasonable doubt. (*People v. Melhado*, *supra*, 60 Cal.App.4th at p. 1536, relying on *Chapman v. California* (1967) 386 U.S. 18, 24.)[8]

We conclude that the evidence left no room for doubt about the specific acts on August 27th on which the count 1charge was based. Although the evidence arguably could be interpreted to show that Jose made more than one actionable threat on August 28th, giving rise to a theoretical possibility that jurors could have disagreed about which particular statements constituted the threat charged in count 2, we conclude that the record in this case reveals no realistic or reasonable likelihood that the jurors were less than unanimous in their agreement on which particular statements constituted the threat charged in count 2. On the record in this case, the unanimity instruction requested by Jose therefore was unnecessary, and its absence was of no practical consequence.

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8 The *Chapman v. California* "harmless beyond a reasonable doubt" standard of review applies to this error: "'Since principles of due process protect the accused against conviction except upon proof beyond a reasonable doubt [citation], an instruction to the jury which has the effect of reversing or lightening the burden of proof constitutes an infringement on the defendant's constitutional right to due process. [Citations].' [Citation.] An error in instruction which significantly misstates the requirement that proof of guilt be beyond a reasonable doubt 'compels reversal unless the reviewing court is "able to declare a belief that it was harmless beyond a reasonable doubt." [Citation.]'" (*People v. Deletto*, *supra*, 147 Cal.App.3d at p. 472.)

A. The trial court did not err by failing to give a unanimity instruction as to the crime charged in count 1.

Proof that Jose was guilty of the crimes charged in counts 1and 2 each required proof of the following elements: Jose willfully threatened to unlawfully kill or cause great bodily injury to Yvonne; he intended that his threat would be understood as a threat; under the circumstances it was made, the threat was so unequivocal, unconditional, immediate and specific as to communicate to Yvonne a serious intention and immediate prospect that the threat would be carried out; the threat caused Yvonne reasonably to be in sustained fear for her safety; and the fear was reasonable under the circumstances. (§ 422; CALCRIM 1300; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Count 1 charged that Jose had threatened Yvonne on August 27, 2009; count 2 charged that he had threatened Yvonne on August 28, 2009. The proof required to establish those charges was supplied by Yvonne's testimony, bolstered by statements and admissions contained in certain of Jose's and Yvonne's recorded telephone conversations played to the jury.

Yvonne testified that on August 27th Jose had become upset and angry at the park, when she received a text message from a male he did not know. As they walked to Yvonne's car, she testified that Jose yelled at her two or three times, in a harsh tone of voice, to "shut the fuck up or he was going to break my jaw if I wasn't going to tell him the truth" about the text message's sender. Jose continued yelling at her as they got into the car and drove, and he threw her phone so that it hit her shin. That episode made Yvonne afraid "of getting hit," due to "the prior violence that [they had] had" (in addition to being afraid her phone had been broken when he threw it).

The prosecutor argued to the jury that the episode at the park constituted the threat on which the count 1 charge was based. "Now, we have two criminal threats here, right? August 27th, which is count 1, and we have August 28th, which is count 2." After reciting the elements required to establish a criminal threat, the prosecutor identified the evidence she believed satisfied those elements with respect to count 1: "He is angry

about the text message and he is demanding to know who it is and she is telling him . . ." And Jose says to Yvonne, "shut the fuck up or I'll break your jaw."[9]

Jose contends that this evidence shows not a single threat, but "two or three" threats to break Yvonne's jaw on August 27th. On that basis he argues that the unanimity instruction was required as to the count 1 charge, because there can be no certainty that in convicting him on count 1 the jurors unanimously agreed he was guilty of the same threat.

We do not agree that the evidence that Jose might have repeated his threat to break Yvonne's jaw multiple times as he and Yvonne walked from the park to her car shows that he made two or three separate criminal threats. Jose's repetition of his threat to break Yvonne's jaw constituted no more than a single threat. The threat was made during a single episode, based on a single circumstance, threatening a single bodily injury, and giving rise to undifferentiated fear on Yvonne's part. (*People v. Diedrich* (1982) 31 Cal.3d 263, 282 ["When two offenses are so closely connected in time that they form part of one transaction, no unanimity instruction is required."]; see also, *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1533; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1208 [when prosecution relies on multiple acts in a continuous course of conduct as single crime, no unanimity instruction is required].)

Even if Jose's repetition of his August 27th threat could have been charged as two or three separate crimes, the unanimity instruction was not required with respect to count 1. The jury could not have found that one of those statements constituted a criminal threat, while his contemporaneous repetitions of exactly the same threat in exactly the

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[9] The prosecutor argued to the jury that Jose's guilt of the count 1 charge was verified by adoptive admissions that the jury had heard on recordings of Jose's later telephone conversations with Yvonne from jail (not transcribed in the record on appeal), in which Jose apparently had apologized for threatening to break her jaw at the park. "The defendant could have denied [the threat at the park to break her jaw] but did not and the specific threat he is admitting to is the August 27th threat."

same context did not. The evidence "gave the jury no basis upon which to discriminate between the . . . incidents." (*People v. Deletto*, *supra*, 147 Cal.App.3d at p. 467.)[10]

The record contains no evidence of any conduct on August 27th, apart from Jose's statements at the park that he would break Yvonne's jaw, which arguably could have constituted a criminal threat under section 422. Neither the prosecution nor the defense contended at any time, either within or outside of the jury's presence, that Jose's statements at that time amounted to more than a single criminal threat. The prosecutor clearly identified the August 27th incident at the park as the sole basis for the count 1 charge, precluding any reasonable possibility that any juror or jurors might have based their count 1 verdict determinations on any other conduct. The trial court's failure to give the unanimity instruction was not error with respect to count 1, because Jose's repeated statement that he would break Yvonne's jaw was unambiguously part of a single threat—and was unambiguously the threat charged in count 1. (See *People v. McIntyre* (1981) 115 Cal.App.3d 899, 910-911.)

B. The lack of an instruction on unanimity for count 2 was harmless beyond a reasonable doubt.

The record in this case also shows that the jury could not have had any reasonable doubt about which specific acts constituted the threat for which it found Jose guilty in count 2. Count 2 of the information charged that Jose made a criminal threat of violence against Yvonne on August 28th. However the evidence as to Jose's statements to Yvonne on August 28th could be interpreted as constituting a number of threats that could be found to fulfill the requirements of section 422. The evidence was that Jose had threatened to kick Yvonne's ass during their telephone conversations that morning after

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[10] In *People v. Deletto*, the court held that no error was shown by the trial court's failure to instruct the jury as to its duty to agree unanimously on the same specific criminal acts, because "the jury's verdict implies that it did not believe the only defense offered" as to all the charged conduct, and the evidence "provided no basis upon which the jury could have distinguished between the two [criminal] acts," and "gave the jury no basis upon which to conclude that one [charged crime] had been committed while another had not." (147 Cal.App.3d at pp. 466-467.)

Yvonne had missed a number of his calls, and again that afternoon as she proceeded home after her police-station visit. Such an interpretation of the evidence could be found to constitute more than one criminal threat on that date, giving rise to a theoretical possibility that different jurors might have based their agreement as to Jose's guilt of count 2 on different specific acts.

The evidence was that on August 28th Jose was gone from the house when Yvonne awoke, and that he became angry on the telephone, asking her why she did not answer and who else was at the house after she had missed some of his telephone calls that morning—while she was showering, she said. She recalled that after her shower and before she left the house, perhaps two or three times Jose angrily "threatened to kick my ass," although "I cannot tell you word for word."

Yvonne testified that she was not sure whether she felt fear as a result of that threat, but "I knew if I got anywhere near him during this time that he was going to kick my ass." That episode provided ample evidence to support all of the elements required to establish Jose's guilt of the count 2 charge.

Yvonne's testimony was somewhat equivocal about her immediate feelings of fear resulting from the threats that morning. She said that "I wasn't scared. . . . I didn't feel fear. Or maybe I did." She nevertheless left her house out of fear that he would return to "kick [her] ass," going to the police station to try to arrange to transfer Jose's clothes without having to meet him alone. But her conduct during the rest of the day was less equivocal. After talking to Jose on the telephone as she drove home from the police station, she returned to the police station out of fear that Jose would be at her home when she arrived; only then did she return to her home to meet the police. And she then stayed at a neighbor's house until the police had declared her house unoccupied.[11]

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[11] The jury in this case undoubtedly saw Yvonne's ambivalence as a credible reaction to her avowed love for Jose and desire to preserve their nine-year marriage for her own sake and that of their son, balanced against the threats and violence she had endured during those years. Nevertheless, that is not the only possible interpretation. A jury could also have harbored some doubt about whether Yvonne's conduct reflected genuine and sustained fear—essential elements of the crimes with which he was charged.

Yvonne's testimony was also that during that afternoon Jose continued to tell her that if she did not meet him at a local bakery or other locations, "he was gonna kick my ass." These events could be seen as part of the same threats that began that morning after her shower; but it could also be interpreted as a separate threat or series of threats, arising after (or perhaps as a result of) her visit to the police station. Thus it would be at least theoretically possible for some jurors to have based their agreement to the count 2 verdict on Jose's threats to kick Yvonne's ass after she missed his call during her shower that morning, and for other jurors to have based their agreement to the count 2 verdict on threats made to kick her ass after she left the police station that afternoon.

However, the possibility that the jurors were less than unanimous in their agreement that Jose was guilty of the crime charged in count 2 for his threat on the morning of August 28th is no more than theoretical. The prosecutor's opening statement told the jury that the evidence would be that on the evening of his release, August 27th, Jose threatened to break Yvonne's jaw at the park, and that the next day Jose threatened to break Yvonne's and her boyfriend's jaws when he came back to the house to pick up his clothes after Yvonne's shower. That was the only specific threat mentioned in the opening statements on behalf of both parties.

After the jury had heard all the evidence, the prosecutor made clear in her argument that the jurors must consider the elements of the crimes separately for counts 1 and 2, "because we have two counts charged. One on one day, one on the other day." After arguing at length that Jose's threat to break Yvonne's jaw on the afternoon of August 27th fulfilled all the elements of a criminal threat required for a conviction on count 1, she told the jury "[t]hat's August 27. Lets move on to August 28th."

With respect to Jose's August 28 conduct, the prosecutor argued that Yvonne had panicked when Jose was gone when she woke up because she thought he might be out drinking, and she had learned during her marriage to him that "drinking equals violence." She argued that Jose accused Yvonne of cheating after she had missed some of his phone calls, threatening to kick her ass. And when the police declined to transfer Jose's clothes to him at the police station, the prosecutor argued that "he is still yelling and screaming

and angry and she's afraid to go home"—afraid because of the threat he had made to kick her ass that morning (along with the earlier threats and his history of domestic violence).

Again, the prosecutor specifically and unambiguously identified the threats Jose had made that morning, and the fear it engendered all that afternoon, as the basis for the count 2 charge. The prosecutor continued: "So she goes back to the police station. So on August 28th, 2009. Did the defendant willfully threaten to unlawfully kill or unlawfully cause great bodily injury to Yvonne Barajas . . . over the phone after that shower, when she finally called him back when he said 'I'll kick your ass.' Absolutely." The prosecutor argued that the threat Jose had made that morning after Yvonne's shower was clear, immediate, unconditional, and specific: ". . . [I]t communicated a serious intention in the immediate prospect that her ass was going to be kicked."

The prosecutor's argument to the jury with respect to events that occurred the afternoon of August 28th was directed entirely toward how the evidence showed that Yvonne felt genuine fear stemming from the threat Jose had made earlier that morning, and from his history of domestic violence. The threat that Jose made on the morning of August 28th following Yvonne's shower, she argued, fulfilled the elements required to prove the criminal threat charged in count 2, just as the threat on August 27th had satisfied the elements of the count 1 charge. "He threatened her the day before. Now here he is threatening her all over again." The prosecutor's argument did not mention any other threatening statements Jose might have made on August 28th.

If any doubt had remained in any juror's mind about the specific events constituting the count 1 and count 2 charges, any such doubt would have been dispelled by the argument of Jose's counsel. After arguing that Yvonne did not display genuine or sustained fear after the threat at the park on August 27th, Jose's counsel unequivocally identified the count 2 charge as relating to Jose's threat to kick Yvonne's ass after she missed his phone calls on the morning of August 28th: "The second count what does he say? 'If I come home and he's there I'm gonna kick your ass."

Jose's counsel's argument to the jury, like the prosecutor's, identified a single threat on each day, and did not mention any evidence of other statements on August 28th

that could have been interpreted as separate threats. Jose's counsel closed her argument by admonishing the jury that in order to determine whether all the elements of each of the charged offenses have been proved, "[y]ou have to decide them separately, take a look at the one on Thursday 8-27. Look at the one on 8-28."

Thus both the prosecution and the defense identified the count 1 threat as being on August 27th, and the count 2 threat as being on August 28th. Both identified the basis for the count 1 charge as the August 27 threat to break Yvonne's jaw, and the basis for the count 2 charge as the threat the morning of August 28th to kick Yvonne's ass if anyone was there when he returned home for his clothes. Neither argument mentioned or hinted at any other conduct on August 28th that could be found to constitute one of the charged threats.

These arguments of both the prosecutor and defense counsel, focusing entirely on the threat made the morning of August 28th as the basis for the count 2 charge to the exclusion of any evidence that might be interpreted as a separate threat made later that day, dispel any reasonable possibility that the jury could have been less than unanimous about the specific conduct on which it based its count two verdict. No juror could reasonably have understood that he or she was being called upon to find that any statements Jose made later in the afternoon of August 28th constituted the crime for which he was charged in count 2. (*People v. Jones*, *supra*, 51 Cal.3d at p. 321 [jury's potential determination that defendant committed two of three possible criminal acts does not require unanimity instruction, "so long as there is no possibility of jury disagreement regarding the defendant's commission of any of these acts"].)

In light of our conclusion that no ambiguity remained about the conduct for which Jose was being charged in count 2, the trial court was not required to instruct the jury on its obligation to agree unanimously on that conduct. (*People v. Jones*, *supra*, 51 Cal.3d at pp. 321-322; *People v. Melhado*, *supra*, 60 Cal.App.4th at p. 1536.) For this reason we reject Jose's request that we reverse his count 2 conviction on this ground.

III. The Trial Court's Error In Failing To Instruct The Jury On The Lesser Included Offense of Attempted Criminal Threat Was Not Harmless Error.

Section 664 provides that "[e]very person who attempts to commit any crime"—including the crime of making a criminal threat—"is subject to criminal punishment" as provided in that section. (*People v. Toledo, supra,* 26 Cal.4th at p. 230.) Jose contends in this appeal that the trial court erred prejudicially by failing, sua sponte, to instruct the jury on the lesser included offense of *attempted* criminal threat with respect to counts 1 and 2

The trial court must instruct on any lesser included offense supported by evidence in the record, when a jury could find that the defendant is guilty of the lesser, but not the greater, crime. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "Where the evidence warrants, the rule ensures that the jury will be exposed to the full range of verdict options . . . . In this context, the rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other." (*People v. Birks* (1998) 19 Cal.4th 108, 119.)

In *People v. Toledo, supra*, 26 Cal.4th 221, the defendant had been charged with making a criminal threat against his spouse (§ 422), as well as with two assaults against her with deadly weapons (§ 245). At his trial the jury was instructed on the offense of criminal threat, and on the lesser included offense of attempted criminal threat. He was found not guilty of the criminal threat and one of the assault charges, but guilty of the attempted criminal threat and the other assault charge. The Supreme Court affirmed the attempted criminal threat verdict, rejecting the defendant's contention that no such crime exists. (*People v. Toledo, supra,* 26 Cal.4th at pp. 229-235.)

In affirming that verdict, the court discussed circumstances that might justify an attempted criminal threat conviction, including the following example: "[I]f a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such

fear, the defendant properly may be found to have committed the offense of attempted criminal threat." (*Id.* at p. 231.) That is because "only a fortuity, not intended by the defendant, has prevented the defendant from perpetrating the completed offense of criminal threat itself." (*Ibid.*; see § 21a [attempt to commit crime consists of "specific intent to commit the crime, and direct but ineffectual act done toward its commission"].)

The evidence presented to the jury in this case was overwhelming and unequivocal that Jose's threats satisfied all the elements of section 422: He had made the threats with which he was charged; he had done so with the specific intent that his threats would be understood by Yvonne as threats of great bodily injury; and the threats and the circumstances under which they were made were such as to convey to Yvonne a gravity and immediacy that caused her "reasonably to be in sustained fear for . . . her own safety . . . ." Yvonne's testimony about her reasonable fear of him was strongly corroborated by her history as a victim of Jose's violence, by her conduct in seeking police intervention, and by Jose's admissions, apologies, and failures to deny his threats in his jailhouse telephone conversations with her.[12]

Nevertheless, we are constrained by the decision in *People v. Toledo* to find that if the jury had been instructed that it could do so, it might have concluded that Jose's threats against Yvonne constituted only *attempted* criminal threats. It might have concluded, for example—consistent with the example given by the Supreme Court—that although Jose's threats were sufficient to reasonably cause Yvonne to experience sustained fear for her safety, her actual fear did not in fact rise to that level, or that it was not sustained. A jury could have concluded from the evidence that despite his criminal *intent*, one or both of Jose's threats did not in fact instill in Yvonne the fear that he intended, and that would have been a reasonable result of his threats.

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[12] Recordings of some of Jose's telephone conversations from jail were played for the jury, in which Yvonne expressed fear of future violence based on the conduct that had led to his arrest. Jose responded in some instances, for example, that on August 27th and August 28th he did what he did because "'I was frustrated and angry'," and that "I know I fucked up okay? I messed up."

Under *People v. Toledo, supra*, 26 Cal.4th 221, these findings would have justified a conclusion that Jose was guilty of an *attempted* criminal threat, but not an *actual* criminal threat as to either or both of the criminal threat charges. Instructions on a lesser included offense are required whenever evidence that the defendant is guilty only of the lesser offense is "'"substantial enough to merit consideration"'" by the jury. (*People v. Moye* (2009 47 Cal.4th 537, 553.) "'"Substantial evidence" in this context is "'evidence from which a jury composed of reasonable [persons] could … conclude[]'" that the lesser offense, but not the greater, was committed. [Citations.]'" (*Ibid.; People v. Breverman, supra*, 19 Cal.4th at p. 162.) We therefore must conclude that the trial court erred in failing to instruct the jury on the lesser included offense of attempted criminal threat. (*People v. Toledo, supra*, 26 Cal.4th 221.)

On the evidence in this case we are unable to find that this error was harmless beyond a reasonable doubt. Yvonne's testimony was, at some points, equivocal about whether Jose's specific threats resulted in sustained fear. Although she testified that his August 27th threat caused her to feel scared, "because of the prior violence that we've had," she nevertheless "wanted to keep the marriage together." After the August 27th threat, she did not call the police; she got into the car with him; she invited him into her home, and into her bed that night; and she called him on his phone the next morning. Moreover, she testified that after the threats on August 28th, "I wasn't scared," and "I didn't feel fear. Or maybe I did." She continued to converse with him frequently on the phone. And even after Jose was rearrested and returned to jail on August 28th, although she moved her residence, Yvonne provided him with her new telephone number; she continued to prepay his phone card, to converse with him on the phone (despite her knowledge that those calls were not permitted); she visited him in jail (using her maiden name in order to gain entry despite the rules against visits by domestic violence victims); and she continued to receive calls from him, even during his trial.

This evidence does nothing to show that Jose lacked the criminal intent when he threatened Yvonne with violence, nor does it in any way mitigate or excuse his conduct. However, it does provide grounds for his counsel's arguments that his threats did not in

fact induce sustained fear on Yvonne's part. Understandably, in their arguments to the jury both the prosecution and the defense therefore focused substantial attention on the question whether Jose's threats in fact caused Yvonne sustained fear. The prosecutor argued that they did.

Jose's counsel's did not ask the jury to find that Jose had not threatened Yvonne with serious injury, or that his threats were not credible, or even that it would not have been reasonable for her to have genuine fear under the circumstances. Instead she attempted to sow doubt about whether the threats *actually did* result in sustained fear on Yvonne's part. She argued that after Jose had threatened to break Yvonne's jaw, "[s]he doesn't make her way out of this and say, 'I'm outta here.'" She argued that although Jose's conduct might understandably have caused Yvonne to relive earlier times when he had gotten drunk and inflicted domestic violence on her and their son, "[s]he didn't just call her girlfriend and her girlfriend's mom and her cousin to try to see if she could stay somewhere." "She had [opportunities] to say 'I'm not going to stick around' but she didn't do that. Because she didn't have that sustained fear. She wasn't — she didn't really think he was going to hit her."

The jury was well justified in disregarding the seeming inconsistencies in Yvonne's conduct and testimony, despite its occasional equivocation about her fear of violence. The jury undoubtedly found these inconsistencies in Yvonne's testimony understandable in light of her history as a victim of domestic violence, her professed continuing love for Jose and desire to rebuild their marriage, and her obvious discomfort in her role as prosecution witness against him. When it convicted Jose of counts 1 and 2, the jury must have excused these inconsistencies.

But no matter that the jury was justified in finding Jose guilty of counts 1 and 2 as charged, it nevertheless is possible that if they been given the opportunity to find Jose guilty of the lesser included offense, one or more jurors could reasonably have found that Yvonne's fear was less than certain, or less than sustained. On this record, we therefore are compelled to reverse the judgment. We cannot find that the error in failing to instruct the jury on the lesser included offense was harmless.

Although the count 1and count 2 convictions must be reversed for this error, a retrial of the charges against Jose is required only if the prosecution seeks again to convict Jose on the greater offenses. "When a greater offense must be reversed, but a lesser included offense could be affirmed, we give the prosecutor the option of retrying the greater offense or accepting a reduction to the lesser offense. (*People v. Kelly* (1992) 1 Cal.4th 495, 528.)

Disposition

The judgment is reversed with directions that, unless the People bring defendant to trial on count 1, count 2, or both of them within 60 days after the filing of the remittitur in the trial court, the trial court shall proceed as though the remittitur modifies the judgment on the count 1 and the count 2 verdicts to reflect convictions for attempted criminal threat. The finding that Jose's prior conviction for battery with serious bodily injury constituted a strike is reversed and remanded for retrial on the prior conviction allegation.

The trial court shall retry or resentence defendant consistent with these directions, and shall (if appropriate) prepare a new abstract of judgment reflecting the changes made and forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.